

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:11-bk-6801-PMG

Mark Edward Schlagel
Tammie Malkiewicz Schlagel,

Debtors.

Chapter 13

**ORDER ON TRUSTEE'S AMENDED MOTION
TO MODIFY CONFIRMED CHAPTER 13 PLAN**

THIS CASE came before the Court for a final evidentiary hearing to consider the Amended Motion of Douglas W. Neway, Chapter 13 Trustee, to Modify Confirmed Chapter 13 Plan. (Docs. 63, 64).

Pursuant to §1329 of the Bankruptcy Code, the payments under a confirmed Chapter 13 plan may be increased or decreased in response to changes in a debtor's financial circumstances. In order to be approved, a proposed modification must satisfy the requirements of §1325(a) of the Bankruptcy Code, including the feasibility requirement provided by §1325(a)(6).

In this case, the Trustee's modification proposes to increase the Debtors' payments under the Plan from \$741.00 per month to \$6,440.00 per month, effective as of January of 2012. The modification should not be approved, because the Trustee has not met his burden of showing that the proposed Plan is feasible as required by §1329(b)(1) and §1325(a)(6) of the Bankruptcy Code.

Background

The Debtors, Mark Edward Schlager and Tammie Maliewicz Schlager, filed a petition under Chapter 13 of the Bankruptcy Code on September 14, 2011. The Debtors are married and have two children who were teenagers as of the petition date.

Mr. Schlager operates a business known as Ashian Services. Mrs. Schlager is employed by Lender Processing Services. According to Form B22C filed on September 27, 2011, the Debtors' disposable income under §1325(b)(2) of the Bankruptcy Code was -\$219.39 per month. (Doc. 17).

On December 8, 2011, the Court entered an Order Confirming the Debtors' Chapter 13 Plan. (Doc. 43). Generally, the confirmed Plan provided for the Debtors to make payments in the amount of \$741.00 per month for a period of sixty months.

On January 22, 2014, the Chapter 13 Trustee filed an Amended Motion to Modify the Confirmed Plan. (Doc. 63). In the Motion, the Trustee asserts that the Debtors' disposable income increased in 2012, after the Plan was confirmed, and that their Plan payments should be increased to reflect the additional income. Specifically, the modified Plan proposed by the Trustee provides for the Debtors to make payments in the increased amount of \$6,440.00 per month commencing in January of 2012 and continuing for the life of the Plan. The modified Plan, as proposed, also provides for the Debtors to submit their 2012 tax refund of \$2,090.00 to the Plan in October of 2013.

The Debtors oppose the modification, and assert that their disposable income has not increased since the petition date. (Docs. 57, 75).

Discussion

The Trustee's Motion is filed pursuant to §1329 of the Bankruptcy Code. (Doc. 63). Section 1329(a) provides in part:

§1329. Modification of plan after confirmation

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan.

11 U.S.C. §1329(a)(1). “The policy underlying §1329 is to ‘allow upward or downward adjustment of plan payments in response to changes in a debtor’s circumstances which substantially affect the ability to make future payments.’” In re Prieto, 2010 WL 3959610, at 2 (Bankr. M.D. Fla.)(quoting In re Wetzel, 381 B.R. 247, 251 (Bankr. E.D. Wis. 2008), and In re Nott, 269 B.R. 250, 252 (Bankr. M.D. Fla. 2000)). The focus of the statute is the debtor’s ability to pay his creditors. In re McAllister, 510 B.R. 409, 423-24 (Bankr. N.D. Ga. 2014).

Section 1329(b)(1) sets forth the requirements that must be satisfied for a plan modification to be approved. That section provides:

§1329. Modification of a plan after confirmation

...

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

11 U.S.C. §1329(b)(1)(Emphasis supplied). Under §1329(b)(1), it is clear that motions to modify confirmed plans are subject to the requirements of §1325(a) of the Bankruptcy Code. In re Eckert, 485 B.R. 77, 84 (Bankr. M.D. Penn. 2013). In other words, a proposed modification must satisfy the good faith requirement of §1325(a)(3), the “best interest of creditors” test of §1325(a)(4), and the feasibility test of §1325(a)(6). In re Prieto, 2010 WL 3959610, at 2.

A “feasible” plan is defined by §1325(a)(6) as a plan in which “the debtor will be able to make all payments under the plan and to comply with the plan.” 11 U.S.C. §1325(a)(6). To find that a proposed modification satisfies the feasibility test, a Court “should be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan.” In re Eckert, 485 B.R. at 85.

A. The proposed modification

In this case, the Order Confirming Chapter 13 Plan entered on December 8, 2011, provides for the Debtors to make payments in the amount of \$741.00 per month for a period of sixty months. (Doc. 43).

The modified Plan proposed by the Trustee on January 22, 2014, provides for the Debtors to make the following payments:

Months 1 through 3 (October 2011 to December 2011) -- \$741.00

Months 4 through 24 (January 2012 through September 2013) -- \$6,440.00

Month 25 (October 2013) -- \$8,530.00

Months 26 to 60 (November 2013 to September 2016) -- \$6,440.00

(Docs. 63, 64). Consequently, the Trustee’s modification proposes to increase the Debtors’ payments from \$741.00 per month to \$6,440.00 per month, an increase in the amount of \$5,699.00 per month (\$6,440.00 minus \$741.00 = \$5,699.00). Further, under the proposed modification, the increased payments are retroactive to January of 2012.

The Trustee asserts that the increase is appropriate under §1329 because the “Debtors have provided to the Trustee financial information for the 2012 tax year that reflects an increase in monthly disposable income.” (Doc. 63). According to the Trustee, Mrs. Schlagel’s pre-confirmation gross

income in 2011 was approximately \$118,000.00 per year, and her post-confirmation gross income in 2012 was approximately \$139,573.00 per year, as reflected on the 2012 tax return. (Trustee's Exhibit 2). Accordingly, the Trustee contends that Mrs. Schlager's post-confirmation income increased by the sum of \$21,635.00 per year, or approximately \$1,800.00 per month. (Transcript, p. 9).

Mr. Schlager operates a carpentry business as a sole proprietorship, and the Debtors' 2012 tax return reflects that he suffered a business loss for the 2012 tax year. (Transcript, p. 10; Trustee's Exhibit 2). The Trustee asserts, however, that Mr. Schlager claimed certain business expenses for purposes of the 2012 tax return that are not allowable expenses for purposes of determining disposable income in his bankruptcy case. If the expenses are disallowed, the Trustee contends that Mr. Schlager's business would show gross income of \$60,000.00 in 2012, instead of the loss reflected on the tax return. (Transcript, pp. 10-12).

If Mrs. Schlager's post-confirmation income is combined with Mr. Schlager's business income, the Trustee asserts that "the debtors, as of January of 2012, could in fact afford plan payments of \$6,440." (Transcript, p. 12).

B. Feasibility

The "proponent of a plan modification bears the burden of proof that the statutory requirements have been met." In re Eckert, 485 B.R. at 80.

When plan modification is sought by a trustee, an unsecured creditor, or a debtor, the statutorily-created tests of good faith, best efforts or liquidation analysis, and feasibility apply. 11 U.S.C. §§1325(a)(3),(4),(6), 1329(b)(1); *see Wetzel*, 381 B.R. at 254-55. And the movant has the burden of proof by a preponderance of the evidence on all issues.

In re Powers, 507 B.R. 262, 273-74 (Bankr. C.D. Ill. 2014)(Emphasis supplied). The statutory tests of good faith, best efforts, and feasibility apply to plan modifications under §1329, and the party seeking

the modification bears the burden of proof on these tests. In re Wills, 2014 WL 2442275, at 4 (Bankr. C.D. Ill.).

In this case, the Trustee has not met his burden of proving that the proposed modification is feasible.

1. The Debtors' income

First, the Trustee has not shown that the alleged increase in income is sufficiently stable to enable the Debtors to make the payments provided by the modified plan and to comply with the modified plan. 11 U.S.C. §1325(a)(6). The Debtors did not testify, and the only evidence of the increased income in the record consists of the Debtors' 2012 and 2013 income tax returns.

The tax returns show that the Debtors work at the same jobs that they held when the original Plan was confirmed. They have not obtained new or additional employment.

a. Mrs. Schlager

The Debtors filed an Amended Schedule I and an Amended Form B22C on September 27, 2011, prior to confirmation of their Chapter 13 Plan. (Doc. 17). The Amended Schedule and Form indicate that Mrs. Schlager's pre-confirmation gross income equaled the approximate sum of \$118,000.00 per year. The Order Confirming Plan was entered on December 8, 2011. (Doc. 43).

The Debtors' 2012 tax return indicates that Mrs. Schlager's gross income equaled the approximate sum of \$139,573.00 in 2012, or an increase of more than \$21,000.00 over her scheduled pre-confirmation income. (Trustee's Exhibit 2). The Debtors' 2013 tax return indicates that her gross income equaled the approximate sum of \$134,639.00 in 2013, a reduction of almost \$5,000.00 from the prior year. (Trustee's Exhibit 3).

The difference in amounts is not explained in the record. The Court cannot determine, for example, whether the varying amounts represent changes in Mrs. Schlager's position or salary, or whether the differences represent one-time bonuses or performance-based income.

In either case, the Court cannot determine whether the increase in Mrs. Schlager's post-confirmation income is sufficiently stable to enable the Debtors to make the additional payments proposed by the Trustee over the term of the modified Plan.

b. Mr. Schlager

As to Mr. Schlager, the Trustee has not shown that his income actually increased after the entry of the Confirmation Order in 2011. The Debtors' Amended Schedule I and Amended Form B22C indicate that Mr. Schlager received pre-confirmation gross income from his business in the range of \$24,000.00 to \$28,800.00 per year. (Doc. 17).

The Debtors' 2012 tax return indicates that Mr. Schlager suffered a business loss in the amount of -\$5,676.00 in 2012. (Trustee's Exhibit 2). The Debtors' 2013 tax return indicates that Mr. Schlager suffered a business loss in the amount of -\$9,479.00 in 2013. (Trustee's Exhibit 3).

At the modification hearing, the Trustee asserted that certain business expenses claimed by Mr. Schlager on the tax returns should not be allowed for bankruptcy purposes, and that "his business actually grossed close to \$60,000 in the 2012 fiscal year" if a number of vehicle and depreciation expenses claimed on the returns were not deducted. (Transcript, pp. 11-12).

Consequently, the Trustee's assertion of additional income depends solely upon a calculation of Mr. Schlager's post-confirmation income in which the business expenses claimed on the tax returns are disallowed. The Trustee contends that Mr. Schlager's post-confirmation income should be calculated by applying the standards set forth in §1325(b) of the Bankruptcy Code. (See Transcript, p.

11, for example, where the Trustee specifically states that the appropriate deductions are the deductions allowed on Form B22C, which is the calculation of disposable income under §1325(b) of the Bankruptcy Code).

The Trustee's position is not supported by the Bankruptcy Code. The Trustee seeks to disallow the business expenses claimed by Mr. Schlagel on his 2012 tax return because they were not determined by §1325(b) of the Bankruptcy Code, but §1325(b) does not apply to plan modifications under §1329:

The clear weight of authority is that the disposable income provision of §1325(b) does not apply to plan modifications under §1329. (Citations omitted).

...

[B]ecause §1325(b) is limited to use in the confirmation process and not included in §1329(b)(1), §1325(b) does not apply to plan modifications and cannot, therefore, provide substantive authority for modifying a confirmed plan to reset disposable income.

In re Powers, 506 B.R. 262, 269-70 (Bankr. C.D. Ill. 2014). Section 1325(b) "does not apply to plan modifications. To the extent the Trustee seeks to reset the Debtors' disposable income under §1325(b) by his Motion to Amend, the Motion must be denied." In re Coay, 2012 WL 2319100, at 7 (Bankr. C.D. Ill.).

In this case, the Trustee's proposed modification involves a recalculation of Mr. Schlagel's post-confirmation business income to comply with §1325(b) of the Bankruptcy Code. The Trustee has not established, however, that Mr. Schlagel's income actually increased after the entry of the Confirmation Order in December of 2011.

For the reasons discussed above, the Court finds that the Trustee did not satisfy his burden of showing that the Debtors received an increase in their post-confirmation income that is sufficiently stable to enable them to make the payments proposed by the modified Plan.

2. The Proposed Payments

Second, the Trustee's proposed modification provides for the Debtors' payments to increase from \$741.00 per month to \$6,440.00 per month, an increase in the amount of \$5,699.00 per month, and also provides for the increased payments to relate back to January of 2012.

In this regard, the proposed modification is unlike the plan in Prieto, in which the Court approved a modification that increased the debtors' payments from \$675.00 per month to \$1,055.00, an increase in an amount of \$380.00 per month. In re Prieto, 2010 WL 3959610, at 5-6. Instead, the Trustee's proposed modification in this case is more like the plan in Eckert, in which the Court denied a motion to increase the debtors' payments from \$500.00 per month to \$2,500.00 per month, an increase that the Court found to be disproportionate to the debtors' rise in income. In re Eckert, 485 B.R. at 85.

Additionally, under the Trustee's proposed modification, the increased payment amount is retroactive to January of 2012, one month after entry of the Order confirming the Debtors' original Plan. The Trustee filed his initial Motion to Modify the Confirmed Plan on September 5, 2013, and his Amended Motion to Modify the Plan on January 22, 2014. (Docs. 55, 63). If the modification were approved, therefore, it appears that an amount exceeding \$170,000.00 would be immediately due to the Trustee. ($\$5,699.00 \times 30 \text{ months} = \$170,970.00$).

The evidence does not show that the proposed modification is feasible. The modification proposes an increase in the amount of \$5,699.00 per month, retroactive to January of 2012. Under

these circumstances, the Court cannot determine that the Debtors would be able to make the payments proposed by the Plan and to comply with the Plan.

C. The 2012 Tax Refund

The Debtors' 2012 tax return reflects a refund due to the Debtors in the amount of \$2,090.00. (Trustee's Exhibit 2). The Trustee asserts that the refund should be turned over by the Debtors for distribution under the Plan.

It is generally held that a post-confirmation tax refund is income that is subject to administration by a Chapter 13 trustee. In re Carrasco, 395 B.R. 154, 156 (Bankr. M.D. Fla. 2008)(citing In re LaPlana, 363 B.R. 259 (Bankr. M.D. Fla. 2007)). Consequently, the Trustee publishes specific procedures for the turnover of refunds received during the life of a plan, and the Debtors acknowledge that "a refund should be treated as additional income." (Debtors' Exhibit 4; Transcript, p. 14).

For these reasons, the Debtors should be required to submit their 2012 tax refund to the Trustee for distribution under the confirmed Plan.

Conclusion

Pursuant to §1329 of the Bankruptcy Code, the payments under a confirmed Chapter 13 plan may be increased or decreased in response to changes in a debtor's financial circumstances. In order to be approved, a proposed modification must satisfy the requirements of §1326(a) of the Bankruptcy Code, including the feasibility requirement provided by §1325(a)(6).

In this case, the Trustee's modification proposes to increase the Debtors' payments under the Plan from \$741.00 per month to \$6,440.00 per month, effective as of January of 2012. The modification should not be approved, because the Trustee has not met his burden of showing that the proposed modification is feasible as required by §1329(b)(1) and §1325(a)(6) of the Bankruptcy Code.

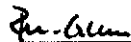
Accordingly:

IT IS ORDERED that:

1. The Amended Motion of Douglas W. Neway, Chapter 13 Trustee, to Modify Confirmed Chapter 13 Plan is granted in part and denied in part as set forth in this Order.
2. The Debtors, Mark Edward Schlagel and Tammie Malkiewicz Schlagel, are directed to turn over their 2012 tax refund in the amount of \$2,090.00 to the Chapter 13 Trustee within thirty (30) days of this Order.
3. The Amended Motion to Modify Confirmed Chapter 13 Plan is otherwise denied.

DATED this 6 day of August, 2014.

BY THE COURT



PAUL M. GLENN
United States Bankruptcy Judge